IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

STACEY HANEY, individually and as Parent and Natural Guardian of HARLEY HANEY, a minor, and PAIGE HANEY, a minor, and BETH VOYLES and JOHN VOYLES, husband and wife, ASHLEY VOYLES, individually, LOREN KISKADDEN, individually, GRACE KISKADDEN, individually Plaintiffs, vs. RANGE RESOURCES -APPALACHIA, LLC, et al., Defendants.	Consolidated at Docket No. 2012-3534 The Honorable Katherine B. Emery, President Judge **MEMORANDUM OF LAW RE: OMNIBUS MOTION TO QUASH SUBPOENAS** Filed on behalf of Intervenor: The Pittsburgh Post-Gazette Counsel of Record for This Party: FREDERICK N. FRANK, Esquire Pa. I.D. #10395 JOHN C. SCIALABBA, Esquire Pa. I.D. #324493 FRANK, GALE, BAILS, MURCKO & POCRASS, P.C. Firm I.D. No. 892 33rd Floor, Gulf Tower 707 Grant Street Pittsburgh, PA 15219 (412) 471-5912
STACEY HANEY, individually and as Parent and Natural Guardian of HARLEY HANEY, a minor, and PAIGE HANEY, a minor, and BETH VOYLES and JOHN VOYLES, husband and wife, ASHLEY VOYLES, individually, LOREN KISKADDEN, individually, GRACE KISKADDEN, individually, Plaintiffs, vs. SOLMAX INTERNATIONAL, INC., Defendant.	

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

STACEY HANEY, et al., Plaintiffs, vs. RANGE RESOURCES – APPALACHIA LLC, et al., Defendants.	:	CIVIL DIVISION Case No. 2012-3534
STACEY HANEY, et al., Plaintiffs, vs. SOLMAX INTERNATIONAL, INC., Defendant.	:	

MEMORANDUM OF LAW RE: OMNIBUS MOTION TO QUASH SUBPOENAS

I. SUMMARY

Pending before this Court is The Pittsburgh Post-Gazette ("The Post-Gazette") Omnibus Motion, for Protective Order and Award of Counsel Fees ("Omnibus Motion"). The discovery sought by Range Resources at issue arises from The Post-Gazette's Emergency Petition to Intervene and to Unseal Record ("Access Petition"). The sole basis asserted for this discovery is that Range Resources needs to explore whether The Post-Gazette "unduly delayed in making its application for intervention."[1] Range Resources also asserts intervention should be denied because the Access Petition was not filed "during the pendency of the action."[2]

The requested discovery is forbidden under the Pennsylvania Shield Law and the Qualified First Amendment Privilege. The Court, however, does not need to reach those issues if it adopts

[1] Range Resources Response to Omnibus Motion, p. 2
[2] Range Resources Response to Omnibus Motion, ¶10-16.

The Post-Gazette's position that it can intervene at any time to assert the public's right of access to judicial documents, as the time of intervention is the sole basis for the requested discovery.

II. HISTORY OF THE CASE

The Access Petition petitions to intervene in the instant matter in order to assert the public's right of access to the sealed judicial documents, including a motion to enforce a settlement agreement and an order with respect to the motion to enforce.

Range Resources' Response in Opposition to The Post-Gazette's Access Petition ("Response to Access Petition") raises *inter alia* an extremely attenuated argument that The Post-Gazette's petition to intervene is untimely because the action is not pending. In an apparent attempt to aggrandize its opposition to the Access Petition, Range Resources issued subpoenas to the following: Sally Stapleton (Managing Editor for The Post-Gazette); David Templeton (Reporter for The Post-Gazette); Don Hopey (Reporter for The Post-Gazette); and a corporate designee of PG Publishing Co. D/B/A The Pittsburgh Post-Gazette (collectively referred to as the "Subpoenas").

Although the Access Petition presents extremely narrow legal issues and is clear that Range Resources alone bears the burden of proof[3], the Subpoenas request extensive documents related to the Post-Gazette's reporters' communications with the Plaintiffs and The Post-Gazette's reporting, in particular notes related to an article published on January 28, 2019. The Subpoenas have absolutely nothing to do with the legal and factual issues in the Access Petition and are a clear attempt to intimidate the press. The Subpoenas blatantly target information and documentation that are protected by the Pennsylvania Shield Law and the Qualified First Amendment Privilege, which protect reporters from subpoenas for notes, documents or testimony. The Post-Gazette filed the

[3] The Access Petition sets forth a claim for public access to two motions and orders filed under seal in the underlying litigation. The Access Petition is clear that the only way public access to judicial documents can be defeated is for Range Resources, and any other opponent of access, to overcome the presumptions of access under the Pennsylvania Constitution, the common law and First Amendment right of access. *See Zdrok v. Zdrok*, 829 A.2d 697, 699 (Pa. Super. 2003) (demonstrating that Range Resources under the common law approach must show that its interest in secrecy outweighs the presumption of openness and even if successful, Range Resources must then overcome the heightened constitutional burden by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest).

Omnibus Motion because the Subpoenas must be quashed pursuant to the aforementioned privileges.

Range Resources' Response in Opposition to Pittsburgh Post-Gazette's Omnibus Motion ("Response to Omnibus Motion") is a clear attempt to legitimize the irrelevant and harassing requests contained in the Subpoenas. For the first time, in its Response to Omnibus Motion, Range Resources asserts that the Access Petition should be denied because The Post-Gazette "unduly delayed in making application for intervention". Response to Omnibus Motion, p. 2 *citing* Pa. R.C.P. No. 2329(3). Referencing Pa. R.C.P. No. 2327 and Pa. R.C.P. No. 2329(c), Range Resources asserts that the Subpoenas' pursuit of protected source material and other irrelevant documents and testimony "are directly relevant to the timeliness of the Post-Gazette's [Access] Petition." Response to Omnibus Motion, p. 2.

The timeliness argument raised by Range Resources in its Responses to Access Petition and Omnibus Motion is a red herring. Range Resources' timeliness argument has been resolutely and unequivocally rejected. There is absolutely no temporal element to the right of the press to intervene to assert the rights of access. Range Resources, in its Responses to the Access Petition and the Omnibus Motion, *fails to cite one case where intervention by the press has been denied on the basis of timeliness*. In fact, there is no such precedent.

III. ARGUMENT

A. The Post-Gazette's Request to Intervene and Assert the Rights of Access Can Be Made at Any Time

The press' right to seek access to judicial documents can be asserted at any time. Contrary to Range Resources' assertions, the right to intervene is not limited to the pendency of an action or when the request for intervention is made. Range Resources' argument that The Post-Gazette's Access Petition was untimely has no basis in the law and infringes on the press' Due Process rights.

The Pennsylvania Constitution supports the principle that "[A]ll courts should be open." Pa. Const. Art. I, § 11. The press, as an agent of the public, consistently has been found to have standing in matters of public access. *See PG Pub. Co. v. Governor's Office of Admin.*, 120 A.3d 456,462 (Pa. Cmmw. 2015), *aff'd* 135 A.3d 578 (Pa. 2016). The tradition of keeping proceedings and records of civil proceedings open to public observation also is founded in the common law and the First

Amendment. As stated in *Publicker Industries v. Cohen*, 733 F.2d 1059, 1071 (3rd Cir. 1984), "[it is] clear that the public and the press possess a First Amendment and a common law right of access to civil proceedings; indeed, there is a presumption that these proceedings will be open." The Courts have held that the filing of a petition to intervene is the proper procedure to assert the public's right of access. *Hutchinson by Hutchinson v. Luddy*, 611 A.2d 1280 (Pa. Super. 1992).

Under *Publicker Industries*, which has been cited with approval by Pennsylvania courts[4], a trial court must satisfy certain procedural and substantive requirements before it can deny access to civil proceedings. *Publicker Industries*, 733 F.2d at 1071. Procedurally, a trial court, before closing a proceeding, must afford the press objecting to closure a full opportunity to be heard with its counsel present. If it decides to order closure, the trial court then must both articulate the countervailing interest it seeks to protect and make findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Publicker Industries*, 733 F.2d at 1071-72.

Engrafting a temporal element to the press' right to intervene as argued by Range Resources would defeat the procedural and substantive guarantees articulated in *Publicker Industries* and thereby violate Due Process. The argument that intervention by the press can be defeated based upon the time of intervention has been expressly rejected. In *Hallowich v. Range Resources, et al.*, No. 234 WDA 2012[5], (Pennsylvania Superior Court), The Post-Gazette and the Washington Observer-Reporter petitioned this Court to unseal records related to a settlement agreement of Range Resources and other parties. *Hallowich* at 5. During a hearing, this Court *sua sponte* raised the issue of timeliness. *Id.* This Court ultimately denied the petitions because the case was not "pending," as it had been settled and closed two weeks earlier. *Id.* at 6.

On appeal, the Superior Court reversed on the grounds that Pa.R.C.P. 2327 and the constitutional presumption of openness in judicial proceedings in conjunction allowed for the press' petition to open. *Id.* 7-12.[6] Specifically, the Superior Court pointed to Pa.R.C.P. 126 which provides for a liberal construing of the Rules of Civil Procedure "to secure the just, speedy and inexpensive

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[4] *See R.W. v. Hampe*, 626 A.2d 1218, 1220 (Pa. Super. 1993).
[5] The Opinion is attached hereto as Exhibit A.
[6] While the Superior Court's decision is a non-precedential decision, it forms part of the *Hallowich* decision which is the precedent of this Court.

determination." *Id.* at 7. The Court stated, citing *PA Childcare LLC v. Flood*, 887 A.2d 309, 311-12 (Pa. Super. 2005), "the right of public access to judicial proceedings has an *independent basis* in the common law as well as the United States Constitution. *Id.* at 9 (emphasis added). The Superior Court held the press is "clearly vest[ed]" with the First Amendment right to file a petition to intervene to access public records. *Id.* at 7.

The Superior Court also pointed out that the need for public access often will not be apparent until such time as an underlying case is concluded. *Id.* The Court recognized that the underlying parties in *Hallowich* had been granted their motion to seal the record on the same day the motion was filed. *Id.* at 11. Such a quick granting of a motion did not give the press enough time to determine the public's interest in the settlement until after the action was discontinued. *Id.*

The Superior Court, relying on a liberal construction of Pa. R.C.P. 2327, as permitted by Pa. R.C.P. 126, vacated this Court's denial of the newspapers' petitions and remanded for consideration of the petitions on the merits. *Id.* at 12. Ultimately this Court found on remand that Range Resources failed to meet its burden under the common law to seal the record. For that reason, this Court held it did not need to determine whether Range Resources met the higher burden under the First Amendment. (Opinion and Order dated March 20, 2013, No. 2010-3954, Washington County, Pennsylvania Court of Common Pleas.)

As noted by the Superior Court, Range Resources' argument defies logic. Where, as here, a record was sealed without any advance notice to the public and an opportunity to be heard, there is obviously no way for the public or press to intervene in advance of sealing. Any delay in requesting intervention is solely attributable to the procedures employed in sealing the record.

Similarly, Range Resources argues in its Response to Access Petition that The Post-Gazette's Access Petition was not filed during the "pendency of the action," therefore rendering the petition procedurally deficient. Response to Access Petition, ¶ 10-16. This interpretation of Pa. R.C.P. 2327[7]

[7] Pursuant to Pa. R.C.P. 2327, in relevant part, a non-party is permitted to intervene "at any time during the pendency of an action" if the determination of such action may affect "any legally enforceable interest" of the non-party, whether or not the party is bound by the judgment in the action.

in the context of press petitions to intervene has been rejected in the *Hallowich* precedent of this Court.

The facts of *Hallowich* track precisely the instant matter, namely that a newspaper, as a representative of the public, is seeking to unseal the record to obtain judicial documents related to a court-accepted settlement agreement. In this case, Range Resources filed its motion to enforce the settlement under seal on August 31, 2018, and the motion was adjudicated September 11, 2018. The Post-Gazette now seeks access to these judicial documents.

B. Range Resources Cites to No Authority that Involves Press Organizations or the Public Right of Access

In its Responses to Access Petition and to Omnibus Motion, Range Resources cites several cases to support its assertion that The Post-Gazette should be denied the right to intervene on the basis for purposes of Pa. R.C.P. 2327 the action is not pending. Specifically, it cites *Inryco, Inc. v. Helmark Steel, Inc.*, 451 A.2d 511 (Pa. Super. 1982); *In re T.T.*, 842 A.2d 962 (Pa. Super. 2004); *Lewis v. Pine Twp.*, 367 A.2d 742 (Pa. Cmmw. 1976); and *Santagelo Hauling, Inc. v. Montgomery County*, 479 A.2d 88 (Pa. Cmmw. 1984). Range Resources claims these cases stand for the proposition that any petition to intervene filed after a case has been closed or a settlement has been reached is not allowed under Pa. R.C.P. 2327. The key difference between this case and the cases cited by Range Resources is that none of the cases cited involved the press asserting the public right of access. For this reason, the cases do not apply.

In *Inryco,* where the Superior Court affirmed a denial of the petition to intervene because it was filed after a settlement decree, the petitioner-intervenor was a litigant in a related action in federal district court. *Inryco*, 451 A.2d at 512. The information the petitioner-intervenor was seeking was considered "proprietary and confidential." *Id.*

In *T.T.*, the petitioner sought to intervene as a party to a custody case concerning his daughter. *T.T.*, 842 A.2d at 964. The Court denied his petition. Its reasoning was the petitioner did not file his petition until ten months after he had received notice that his daughter had been placed in the custody of Armstrong County Children and Youth Services. His petition would unduly delay the proceedings. *Id.* at 965.

The Court in *Lewis* considered whether a township citizens' association could intervene in a zoning dispute. Specifically, the Pine Township Board of Supervisors had agreed to a contract with a commercial developer to purchase and develop land in the township. *Lewis*, 367 A.2d at 577. However, a newly elected Board of Supervisors passed resolutions which attempted to void the commercial development contract. *Id.* at 577. The development company filed a complaint, seeking to compel adherence to the original contract with the old Board of Supervisors. *Id.* Several months after the Court had closed the case and compelled the new Pine Township Board of Supervisors to adhere to the original development contract, the Pine Township Citizens Association and township property owners filed a petition to open the judgment, petitioning against the developer. *Id.* at 577-578. The Court denied the petition because the case had already closed several months prior. *Id.* at 578.

Lastly, *Santangelo* involved an individual petitioner who sought to enforce an injunction entered almost a year earlier against trash hauling companies, preventing them from dumping non-county trash into the county landfill. *Santangelo*, 479 A.2d at 89. The petitioner had not previously been a party in the action but had allegedly witnessed trash hauling companies violating the injunction. *Id.* This Court, like the *Inryco*, *In re T.T.* and *Lewis* courts, denied the petition to intervene because the action was no longer pending as it had been closed for about a year.

None of the four cases which Range Resources cited involved the press seeking to unseal a record or intervene on behalf of the public.

C. Range Resources' Argument Misrepresents the Current Precedent on the Shield Law

Should the Court feel it needs to reach the issue of the Shield Law protections against the Subpoenas, Range Resources' Response to Omnibus Motion blatantly misrepresents the state of precedent on the Shield Law. In its Omnibus Motion, The Post-Gazette draws upon clear Pennsylvania Supreme Court precedent demonstrating that the Shield Law prohibits the compelled disclosure of a confidential source's identity. It encompasses not just testimony, but also documents or reporting materials that could potentially reveal a confidential source's identity. *See* Omnibus Motion, Section II(A) *citing Castellani v. Scranton Times, L.P.*, 956 A.2d 937 (Pa. 2008) and *In re Taylor,* 193 A. 2d 181 (Pa. 1963). Range Resources' Response to Omnibus Motion essentially asserts that

the seminal case of *In re Taylor* has been overruled by subsequent Pennsylvania Supreme Court decisions, primarily *Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346 (Pa. 1987) and *Com. v. Bowden*, 838 A.2d 740 (Pa. 2003). Range Resources' citation to the *Hatchard* and *Bowden* decisions are disingenuous in the extreme and boarders on a material misrepresentation to this Court.

Range Resources asserts that *Hatchard* stands for a complete modification and limitation of the interpretation of the Shield Law set forth in *In re Tayler.* Response to Omnibus Motion, ¶ 43. A plain reading of *Hatchard* clearly shows that the Supreme Court in no way rejected or generally limited *In re Taylor.* Rather, the Supreme Court's ruling in *Hatchard* is limited to the setting of a defamation case because of the competing constitutional rights.

Hatchard involved claims by plaintiffs that they were defamed by certain television news reports. 532 A.2d at 347. The plaintiffs brought suit against television stations and their parent broadcasting companies and sought discovery of production outtakes and other documentary material. *Id.* In one case, the trial court granted a request for discovery of production outtakes but expressly excluded any material that would "reasonably lead to the disclosure of another source by the primary source." *Id.* In the other case, the trial court rejected the defendant's complete withholding of all "documentary material except the materials that were actually broadcast" and granted the plaintiff's motion to compel. *Id.*

At the onset, the Supreme Court is unequivocal that it was *not rejecting or limiting the scope of the Shield Law's protections as set forth in In re Taylor* stating:

> In *In re Taylor* we held that the term "source" included inanimate objects such as documents as well as persons. *We adhere to that view in the present cases.*

532 A.2d at 348 (emphasis added).

Rather than disturbing its holding in *In re Taylor*, the Supreme Court states that the decision was not applicable to the presented issues because *In re Taylor* involved a request for documents for use in connection with a grand jury proceeding and *did not address the scope of discoverable information in a defamation action*:

> However, the present cases present an issue which goes far beyond the one presented in *In re Taylor,* namely, whether the use of the term

> "source" in the context of the statute reflects a legislative intention to protect *all* documentary information from discovery by a plaintiff in a defamation action, regardless of whether the documentary information could reveal a confidential media-informant. That issue is especially significant because the "constitutionalization" of defamation law since *In re Taylor* has made it unmistakably clear that an affirmative answer to the question will immunize many individuals who maliciously or negligently publish false and defamatory statements about others from any legal responsibility for the serious harm caused to the reputation of the targeted individuals.

Id.

Because the plaintiffs' claims presented competing constitutional rights, the Supreme Court indicated that applying *In re Taylor* would result in "serious questions regarding the compatibility of the Shield Law and Article 1, Sections 1 and 11 of the Pennsylvania Constitution[8]." In accordance with this conflict, in order to protect the fundamental right of reputation, the Supreme Court held that:

> unpublished documentary information gathered by a television station is discoverable by a plaintiff in a libel action to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information.

Id. at 351.

As evidenced above, Range Resources' claim that *In re Taylor* was overruled by *Hatchard* is untrue. *Hatchard* clearly created a limited exception to the Shield Law for plaintiffs in defamation actions and no way stands for a general limitation or abdication of *In re Taylor*. Range Resources' omission of the limitation of the ruling to defamation cases is especially troubling given that another case cited in support of its argument, *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997), explicitly advises of *Hatchard*'s narrow application. *See Id.* at 884 (stating that in *Hatchard*, "the supreme court took a second look at the scope of protection afforded by the Shield Law *in the particular context of defamation actions* and determined that *In re Taylor's* interpretation of the Shield Law *was too broad to be applied in such cases*") (emphasis added). *Id.* at 884. Because the plaintiffs in *Davis* sought materials

[8] Sections 1 and 11 of the Pennsylvania Constitution identifies reputation as one of the fundamental interests that cannot be abridged by the legislature.

from a newspaper and one of its reporters in support of its defamation claim, the Superior Court applied the narrow exception set forth in *Hatchard* in limiting the scope of the Shield Law's protections. *Id.* at 885.

Range Resources citation to *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988) is similarly inapplicable in that *Sprague* involved a limited interpretation of the Shield Law in the context of a defamation case. The Court is clear in this limitation in its discussion of *In re Taylor and Hatchard Id.* at 1083.

Range Resources' citation to *Bowden* also is meritless. Like *Hatchard*, *Bowden* does not stand for a complete repudiation or limitation of *In re Taylor.* Rather, the Supreme Court in *Bowden* merely held that *In re Taylor* was not applicable because unlike *In re Taylor*, *all sources in Bowden were known and thus source confidentiality was not at issue.* In *Bowden*, the prosecution in a murder case requested the reporters' notes of a published interview of one of the defendants. No confidential sources were at issue. The Court noted:

> Significantly, in the instant case, there is no risk that the statements at issue will reveal the identities of any confidential human sources. This is so because, in marked contrast to *Taylor,* this case involves discussions between just three individuals: Bowden, Washington, and Tyson. Moreover, only Tyson's statements about his individual actions on the night of the shooting and his relationship with local drug dealers are subject to the trial court's order. Put simply, Tyson made the subject statements to Bowden and Washington, his identity is not confidential, and there is no indication or allegation in this case that the identities of other individuals from whom Tyson may have obtained information will be revealed if Tyson's statements are disclosed. Therefore, unlike *Taylor,* there is no indication here that the identity of ... other persons may [be] revealed through exposure of Tyson's statements.

Bowden, 838 A.2d at 749.

In its Response to Omnibus Motion, Range Resources states that "("...") *Taylor* is not controlling. *Hatchard* and *Bowden* directly address and control the present issues." Response to Omnibus Motion, ¶ 47. A plain reading of these decisions shows that Range Resources' claims is outright false and grossly misrepresentative. *Hatchard* turned on competing constitutional claims

presented by the plaintiffs' reputation rights and *Bowden*, in the exceptional setting of notes sought by the prosecution in a murder case, did not involve confidential sources.

Castellani v. Scranton Times, L.P., 956 A.2d 937 (Pa. 2008), cited in The Post-Gazette's Omnibus Motion, is the last word on the Shield Law by the Pennsylvania Supreme Court. In *Castellani,* plaintiffs in a defamation case who were accused in an article of stonewalling the grand jury, moved to compel disclosure of the articles' unnamed source. The trial court ruled that the Shield Law could not be asserted to the detriment of the grand jury system and ordered disclosure. The Supreme Court reversed, rejecting a "crime fraud" exception to the Shield Law. *Id.* at 954. Notably, the Supreme Court recognized the limited applicability of *Hatchard* and *Bowden*. As to *Bowden*, the Supreme Court states that: "[b]ecause the identity of the source was already known and the statements at issue were not confidential, we concluded that the Shield Law did not prevent disclosure of the murder-defendant's statements to the reporter." *Id.* at 950. As to *Hatchard*, the Supreme Court remarked that "*Hatchard* narrowed *Taylor* in the context of libel actions." *Id.* at 949.

Castellani is unequivocal that Range Resources' claim that *Hatchard* and *Bowden* stand for a general limitation on the Shield Law and rejection of *In re Taylor* is patently false. More importantly, because the issues presented *Hatchard* and *Bowden* are not presented here, the decisions are in no way controlling. In the absence of the issues presented in *Hatchard* and *Bowden*, the Supreme Court in *Castellani* upheld *In re Taylor.* The precedent of *In re Taylor* stands: Documents will be considered sources for Shield Law purposes, where production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the press.

Respectfully submitted:

FRANK, GALE, BAILS, MURCKO, & POCRASS, P.C.

Date: March 14, 2019

By: _____

Frederick N. Frank, Esquire
Attorney for The Pittsburgh Post-Gazette

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEPHANIE HALLOWICH AND CHRIS HALLOWICH, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RANGE RESOURCES CORPORATION, WILLIAMS GAS/LAUREL MOUNTAIN MIDSTREAM, MARKWEST ENERGY PARTNERS, L.P., MARKWEST ENERGY GROUP, LLC AND PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
APPEAL OF: OBSERVER PUBLISHING COMPANY D/B/A OBSERVER-REPORTER, PROPOSED INTERVENOR	:	No. 234 WDA 2012

Appeal from the Order Entered January 31, 2012
In the Court of Common Pleas of Washington County
Civil Division No(s).: C-63-CV-201003954

STEPHANIE HALLOWICH AND CHRIS HALLOWICH, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RANGE RESOURCES CORPORATION, WILLIAMS GAS/LAUREL MOUNTAIN MIDSTREAM, MARKWEST ENERGY PARTNERS, L.P., MARKWEST ENERGY GROUP, LLC AND PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
APPEAL OF: PG PUBLISHING COMPANY, PROPOSED INTERVENOR	:	No. 235 WDA 2012

Appeal from the Order Entered January 31, 2012
In the Court of Common Pleas of Washington County
Civil Division No(s).: C-63-CV-201003954

EXHIBIT A

BEFORE: OLSON, OTT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: FILED: December 7, 2012

Observer Publishing Company, d/b/a Observer-Reporter ("The Observer-Reporter") and PG Publishing Company ("The Post-Gazette") (collectively "Appellants") each appeal from the orders entered in the Washington County Court of Common Pleas denying their petitions, on untimeliness grounds, to intervene in the underlying hydraulic fracturing ("fracking") matter and to unseal the record.[1] For ease of disposition we address these two appeals together.[2] Appellants, who are both in the business of publishing daily newspapers, seek to unseal a settlement agreement between the homeowner-plaintiffs and fracking companies-defendants. We vacate and remand for the court to rule on the merits of Appellants' petitions.

The parties of the underlying matter are plaintiffs Stephanie Hollowich and Chris Hallowich, husband and wife ("Plaintiffs"), and defendants Range

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* Former Justice specially assigned to the Superior Court.

[1] An order denying a petition to intervene is "final and appealable under the collateral order rule embodied in Pa.R.A.P. 313." ***PA Childcare LLC v. Flood***, 887 A.2d 309, 310 n.1 (Pa. Super. 2005) (citation omitted).

[2] A joint *amici curiae* brief was filed by: the Philadelphia Physicians for Social Responsibility; Physicians, Scientists, and Engineers for Healthy Energy; Earthworks, and several individuals. This brief cites water and air pollution and health risks caused by shale gas development, and advocates **unsealing** the record, to "improve transparency about gas operations and their health effects." *Amici Curiae* Brief at 3, 5.

Resources Corporation, Williams Gas/Laurel Mountain Midstream, Markwest Energy Partners, L.P., Markwest Energy Group, LLC, (collectively, "Defendants") and the Pennsylvania Department of Environmental Protection ("DEP"). The DEP "has not taken part in this litigation in any way." Trial Ct. Op., 4/2/12, at 2. For purposes of this appeal, we refer to all of the defendants, with the exception of the DEP, collectively as "Appellees"; they have filed a joint appellee's brief.

Plaintiffs commenced this matter on May 27, 2010, by filing a praecipe to issue a writ of summons. "The lawsuit concerns fracking in and around Plaintiffs' property by Defendants, and Plaintiffs were vocal critics of the fracking process during the pendency of this litigation.[ ]" ***Id.*** at 1. One year later, the parties reached a settlement agreement, which bound not only Plaintiffs, but also their minor children. The trial court summarized:

> Because minor children were involved, [on July 28, 2011,] Plaintiffs filed a Petition for Approval of Settlement of Minors' Actions in accordance with Pa.R.C.P. 2039 and Washington County Local Rule of Court 2039.1. "The settlement agreement contains express confidentiality provisions, collaboratively drafted and consented to by both parties, which are designed to protect Plaintiffs' and Defendants' interest in prevent public disclosure of the terms of their private agreement to resolve this case."

Id. at 2 (citations to record omitted).

On August 11, 2011, Appellees filed a joint motion for a scheduling order for a "hearing in closed court or in chambers" to hear Plaintiffs' petition for approval of the minors' settlement agreement. Joint Mot. for

Scheduling Order, 8/11/11, at 1. The motion specifically requested a hearing date of "August 24, 2011, or as soon thereafter as suits the convenience of the Court." ***Id.*** at 3. An un-stamped scheduling order, dated August 11th, appears in the certified record; a handwritten note, "Hearing to be held August 26, 2011, at 11:00 a.m." appears at the bottom. The trial docket includes one entry for both the scheduling motion and order, which states, "Hearing to be held 08-26-2011, at 11:00 A.M."

Despite the order, the trial court held a settlement conference in chambers on August **23**, 2011. The court's opinion stated, "The settlement conference was rescheduled at the request of the parties to August 23, 2011." Trial Ct. Op. at 2. However, neither the trial docket nor certified record indicates any request for, or notice of, the change in date. On the date of the hearing, "[t]wo reporters identified themselves as being from the Pittsburgh Post-Gazette and requested to join the in chambers settlement conference; that request was denied by the Court."[3] ***Id.*** at 2. Appellees

[3] The record does not indicate how the reporters learned of the hearing. Furthermore, The Post-Gazette avers in its brief that a court official denied the reporters' request to enter the chambers, but informed them "that the Post-Gazette's objections had been noted in the official record by the trial court." Post-Gazette's Brief at 8 (citing Appellants' Joint Brief in Support of Pet. to Intervene and Mot. to Unseal Record). The only indication in the certified record of the reporters' objection is in the trial court opinion, as we have summarized above.

filed a joint motion to seal the record,[4] which the trial "court signed and filed **that same day** at the specific request of all the parties." ***Id.*** (emphasis added). Two weeks later, on September 6th,[5] The Post-Gazette filed a petition to intervene and unseal the record. On September 13th, The Observer Reporter also filed a petition to intervene and joined The Post-Gazette's motion to unseal the record. The petitions invoked the Pennsylvania Constitution's provision, "All courts shall be open," and the United States Constitution First Amendment's right of access to civil proceedings. ***See*** U.S. Const. Amend. I; Pa. Const. Art. I, § 11.

On October 4, 2011, the court held a hearing on Appellants' petitions to intervene and unseal the entire record. The court *sua sponte* raised the issue of the timeliness of the petitions and directed all parties to brief this issue. At another hearing on January 31, 2012, the court denied Appellants' petitions[6] on the ground that they were untimely under Pennsylvania Rule of

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[4] We note that Appellees did not seek sealing of just the settlement agreement, but the entire record.

[5] The trial court stated, "Seven weeks later, on August 31, 2011, Appellant Pittsburgh Post-Gazette filed a Petition to Intervene and Unseal the Record." Trial Ct. Op. at 2. However, both the "filed" time-stamp on the face of the petition and the trial docket indicate this petition was filed on September 6th, which was two weeks after the hearing.

[6] In the interim, Plaintiffs had filed an emergency petition for limited unsealing of the record and for a ruling on the parties' settlement agreement. The court also denied this petition at the January 31, 2012 hearing.

Civil Procedure 2327,[7] as the case was no longer "pending." Trial Ct. Op. at 6. Both Appellants timely appealed, and both complied with the court's order to file a Pa.R.A.P. 1925(b) statement. Appellants' issues overlap, and we consider them together.

In The Observer-Reporter's first issue, it avers that in denying its petition to intervene, the trial court failed to determine first "whether it had a legitimate interest in opening the record, and to "articulate[ ] why it was appropriate to seal the record or stated what alternatives to closure it considered." Observer-Reporter's Brief at 10. The Observer-Reporter cites the United States Constitution First Amendment and Pennsylvania

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[7] Pennsylvania Rule of Civil Procedure 2327, "Who May Intervene," provides:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327(1)-(4).

Constitution, Article I, Section 11 presumption of openness in judicial proceedings, as well as the common law requirement for a party to show his interest in secrecy outweighs the traditional presumption of openness. It then reasons the "court violated the spirit of the procedural rules and the case law on media intervention," citing to Rule of Civil Procedure 126, which provides for the liberal construing of the Rules of Civil Procedure. ***Id.*** at 12-13.

In The Observer Reporter's second issue, it alleges the trial court erred in denying its petition on untimeliness grounds under Rule 2327. Instead, it avers, "[a] request by the media to intervene and open judicial proceedings is proper even after the record is sealed and even if the underlying proceeding is over."[8] Observer-Reporter's Brief at 13. The Observer Reporter also states, "The appellate courts have recognized that it is often the case that the need for public access will not be apparent until such time as an underlying case is concluded." ***Id.*** (citing ***Commonwealth v. Frattarola***, 485 A.2d 1147 (Pa. Super. 1984) (plurality)). It further maintains, "Pennsylvania law clearly vests a newspaper with a First Amendment right to file a Petition to Intervene to access public records and

[8] The Observer Reporter does not cite to legal authority to support this principle of law, but instead refers to a range of four pages in its own joint brief in support of the motion to intervene.

judicial proceedings."[9] ***Id.*** at 15.

On appeal, the Post-Gazette first avers "the oral objection of the Post-Gazette reporters [at the August 23, 2011 settlement hearing] was sufficient to raise their Constitutional and common law rights to an open proceeding." Post-Gazette's Brief at 16. The Post-Gazette also maintains that at the settlement hearing, "the court official . . . assured the reporters [their oral objections] would be put on the official record." ***Id.*** Furthermore, it reasons that the court erred in finding ***Commonwealth v. Buehl***, 462 A.2d 1316 (Pa. Super. 1983), did not apply on the ground that ***Buehl*** involved criminal pretrial proceedings. Instead, The Post-Gazette contends, "The trial court's interpretation ignores [that] well-settled Constitutional and common law rights of access to judicial records . . . apply with equal force to both criminal and civil proceedings." Post-Gazette's Brief at 17.

In its second issue, The Post-Gazette further alleges the court erred in denying its petition on untimeliness grounds under Rule 2327. It claims, "Case law is clear . . . that where the media seeks to intervene to open a judicial record, the action remains 'pending' as applied to Pa.R.C.P. 2327 because the order continues to impact the Constitutional and common law

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[9] The Observer-Reporter also asserts: (1) the court erred in ignoring the "important detail" that the DEP was a named defendant; and (2) when Plaintiffs filed their emergency petition to open the record in November 2011, "it is clear that the case was no longer 'concluded.'" Observer-Reporter's Brief at 16, 17. Because of our disposition, we do not consider these claims.

rights of the media." ***Id.*** at 19. Like The Observer Reporter, The Post-Gazette also argues that the court erred in finding Plaintiffs' filing of their emergency petition did not render the proceedings "pending." ***See id.*** at 24-25. Finally, in its third issue, The Post-Gazette asserts that Appellees' settlement agreement was a judicial record subject to access and no party could rebut the presumption of openness. ***Id.*** at 27.

We first note:

> We review a trial court's decision to grant or deny access to judicial proceedings under an abuse-of-discretion standard. "Our courts have recognized a constitutional right of public access to judicial proceedings based on Article I, Section 11 of the Pennsylvania Constitution, which provides that 'all Courts shall be open.'" Pa. Const. art. I, § 11. The right of public access to judicial proceedings has an independent basis in the common law as well as in the United States Constitution. Accordingly, Pennsylvania has a mandate for open and public judicial proceedings in both the criminal and civil settings.
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> * * *
>
> There are two methods for analyzing requests for closure of judicial proceedings, each of which begins with a presumption of openness—a constitutional analysis and a common law analysis. Under the constitutional approach, which is based on the First Amendment of the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution, the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest. Under the common law approach, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness.

PA ChildCare LLC, 887 A.2d at 311-12 (some citations omitted).

In the instant matter, the trial court denied both Appellants' petitions to intervene on the ground that they were untimely under Rule 2327. As stated above, that rule provides that "a person not a party thereto shall be permitted to intervene" "[a]t any time during the **pendency** of an action[.]" Pa.R.C.P. 2327 (emphasis added). Here, the trial court found Appellants' petitions were not filed during the "pendency" of the underlying action, but instead **after** the case settled. Trial Ct. Op. at 5.

The trial court rejected both Appellants' reliance on ***Frattarola***, 485 A.2d 1147, because in that case, members of the media objected to the closure of a pre-trial criminal hearing, and thus did so during the pendency of the matter. ***See Frattarola***, 485 A.2d at 1148; Trial Ct. Op. at 6. The court also distinguished the federal case of ***Pansy v. Borough of Stroudsburg***, 23 F.3d 772 (3d. Cir. 1994), upon which both Appellants relied. The trial court reasoned that in ***Pansy***, there was no federal rule analogous to Pennsylvania Rule of Civil Procedure 2327, and thus the ***Pansy*** Court "did not determine . . . that the media had the absolute right to file an untimely petition to intervene." Trial Ct. Op. at 7.

We agree with the trial court that Appellants' petitions to intervene and to unseal the record were not filed during the "pendency" of the matter, as required by Rule 2327, as the matter had been settled. ***See Inryco, Inc. v. Helmark Steel, Inc.***, 451 A.2d 511, 513 (Pa. Super.1982) (holding case is no longer pending under Pa.R.C.P. 2327 upon settlement because

settlement decree binds parties with same effect as final decree). However, we agree with The Observer Reporter's argument that in this matter, the trial court should have applied Rule 2327 liberally pursuant to Rule 126. Rule 126 provides:

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa.R.C.P. 126.

We emphasize that the only information about this matter available to the public was the trial docket, which stated the hearing was scheduled for "08-26-2011, at 11:00 A.M." Docket, at 5. Furthermore, the docket paraphrased Appellees' joint motion for a hearing and stated their requested date of "Wednesday, 08-24-2011, or as soon thereafter as suits the convenience of the court." ***Id.*** The docket, however, included no information that the court would instead hold the hearing earlier—not only three days before the date stated in its in scheduling order, but also one day before the date requested by Appellees. In addition, we note Appellees sought to seal the entire record, and not just the settlement agreement, and the court granted Appellees' joint motion to seal the record on **the same day** it was filed.

We agree with the Observer-Reporter's reasoning that it "had no interest [in the underlying action] which would justify intervention until the

record was sealed." ***See*** Observer-Reporter's Brief at 13. In light of all the foregoing, we hold the court should have liberally construed Rule 2327 and accepted as timely filed both Appellant's petitions to intervene and to unseal the record. Accordingly, we vacate the court's denials of the petitions, remand for the court to rule on the merits of the petitions, pursuant to ***PA ChildCare LLC*** and relevant authority. The court may request briefs and hold hearings.[10]

Orders vacated. Case remanded with instructions. Jurisdiction relinquished.

Ott, J. files a Concurring and Dissenting Memorandum.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: December 7, 2012

[10] We note the court's advice to Plaintiffs' counsel at the January 31, 2012 hearing: "Candidly, if the children weren't involved, you would have just marked it settled and discontinued and no one would have been the wiser." N.T., 1/31/12, at 10-11.

BEFORE: OLSON, OTT, and FITZGERALD,* JJ.

CONCURRING AND DISSENTING MEMORANDUM BY OTT, J.:

FILED: December 7, 2012

I agree the Appellants have an absolute right to a hearing on their motions to unseal the record. However, I respectfully disagree with the majority's determination that intervention pursuant to Pa.R.C.P. No. 2327 is the basis for granting a hearing on unsealing the record of the minor's compromise.

Neither Appellant had the right to intervene in the petition for a minor's compromise prior to the hearing under any section of Rule 2327. Furthermore, the proposed liberal reading of Pa.R.C.P. No. 126 to allow a post-hearing petition to intervene pursuant to Rule 2327(4) is convoluted and unnecessary.

> In Pennsylvania, the common law, the first amendment to the United States Constitution, and the Pennsylvania Constitution, all support the principle of openness. "All courts shall be open." Pa. Const. Art. I, § 11. More than one basis for the public right of access to civil trials has been articulated. Nonetheless, the presumption of public access is rebuttable.

Storms ex rel. Storms v. O'Malley, 779 A.2d 548, 568 -569 (Pa. Super. 2001) (internal citations omitted). The trial court has the power to seal the official record in certain circumstances.

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* Former Justice specially assigned to the Superior Court.

> Every court has supervisory powers over civil proceedings in progress before it and may deny access where such access may become a vehicle for harmful or improper purposes. *See: Nixon v. Warner Communications, Inc., supra,* 435 U.S. [589,] at 598, 98 S.Ct. [1306,] at 1312, 55 L.Ed.2d [570,] at 580. Thus, the public may be "excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputations [of innocent parties], as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity."

Hutchison by Hutchison v. Luddy, 611 A.2d 1280, 1290 (Pa. Super. 1992).

Therefore, I agree with the majority that this case be remanded to the trial court for a hearing on the merits of the Appellants' motions to unseal the record.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

STACEY HANEY, et al., Plaintiffs, vs. RANGE RESOURCES – APPALACHIA LLC, et al., Defendants.	:	CIVIL DIVISION Case No. 2012-3534
STACEY HANEY, et al., Plaintiffs, vs. SOLMAX INTERNATIONAL, INC., Defendant.	:	

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I, Frederick N. Frank, Esquire, hereby certify that a true and correct copy of the foregoing Memorandum of Law Re: Omnibus Motion to Quash Subpoenas was served upon the above, via email, this 14th day of March 2019:

Frederick N. Frank
Attorney for Intervenor

CERTIFICATE OF COMPLIANCE

I certify that his filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Frederick N. Frame
Signature: [signature]
Name: Frederick N. Frame
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